and Ohio, and destined for points in certain Southern states, while it is held at a distributing point maintained by the shipper in Tennessee, at which point such oil is unloaded from tank cars into various tanks, and from which it is forwarded to its final destination. The Supreme Court of Tennessee dismissed the bill on the ground that it was a suit against the state within the meaning of the Tennessee Constitution. *Held,* (1) the decision of the state court dismissing the bill gives effect to the tax law which it is alleged violates the commerce clause of the United States Constitution, and is, therefore, reviewable by the United States Supreme Court; (2) that such suit is not against a state in violation of the eleventh amendment to the United States Constitution; (3) that such oil is not property engaged in interstate commerce so as to be exempt from state taxation, while it is at the distributing point. (Mr. Justice MOODY, dissents). *General Oil Company* v. *John H. Crain* (1908), 28 Sup. Ct. Rep. 475.

The decision in this case seems to extend the taxing power of a state over the property of a non-resident, in transit, to its fullest extent. It is a business conducted in Tennessee within the meaning of *American Steel & Wire Co.* v. *Speed,* 192 U. S. 500, where the court declares that goods from another state have arrived at their destination, after they are at rest within the state, and are enjoying the protection which the laws of the state afford, and may be taxed without discrimination like all other property within the state. The court, in the principal case, says that a business is carried on within the state of Tennessee, the oil is taken from transportation, brought to rest within the state, and for which the protection of the state is necessary,—a purpose outside of the mere transportation of oil. See *Standard Oil Co.* v. *Combs,* 96 Ind. 179; *Pittsburg Coal Co.* v. *Bates,* 156 U. S. 577; *The Daniel Ball,* 10 Wall. 557; *Coe* v. *Erroll,* 116 U. S. 517; *Cutting* v. *Florida,* 46 Fed. 641. *State* v. *Engle,* 34 N. J. L. 425; *State* v. *Carrigan,* 39 N. J. L. 35; *Standard Oil Co.* v. *Bachelor,* 89 Ind. 1. This is the first time that the Supreme Court of the United States has taken jurisdiction of a case from a state court which had dismissed the case because of lack of jurisdiction. The court here distinctly announces its power to inquire into the question of jurisdiction of a state court, when a Federal question is raised. As to whether it was a suit against a state within the meaning of the eleventh amendment, see preceding note to *Ex parte Young.*

CORPORATIONS—FRANCHISE AND LICENSE DISTINGUISHED.—An amendment to the Colorado Constitution provided that no franchise relating to any street in Denver should be granted without the consent of the electors. The charter of the city provided the same, and in addition that the council might grant a revocable license in any street. The Union Pacific having failed to get a right to lay a spur on one of the streets at an election, proceeded to lay the tracks on the strength of a revocable license procured from the council. Plaintiffs sought to enjoin the construction of the tracks. *Held,* this right granted by council is not a franchise, and does not come under the

clause of the amendment to the constitution. *McPhee & McGinnity Co.* v. *Union Pac. R. Co. et al., Sayre Newton Lumber Co.* v. *Same* (1907), — C. C. A., 8th Cir. —, 158 Fed. Rep. 5.

There is the utmost confusion in the cases in the use of the terms "license" and "franchise," regarding the right of corporations to use city streets. The word "franchise" is very loosely used. None of the customary definitions of a franchise will be found to apply to the cases. The right or privilege essential to performance of the general function of the corporation is made the test in the principal case. In other cases the test is whether the right or privilege is one which can only be granted by the sovereign power. There is the greatest diversity in regard to the nature of the right of a street railroad or gas company to use the streets granted by the common council. There is a strong line of authority which holds that the right is something more than a mere contract right or an easement; that it is a franchise granted by the city acting as an agent of the state, and, consequently, it is from the state; that it is an essential power to the corporation's existence. *Wright* v. *Milwaukee, etc. Ry. Co.*, 95 Wis. 29, 60 Am. St. Rep. 74; *State* v. *Portage City Water Co.*, 107 Wis. 441, 83 N. W. 697; *Linden Land Co.* v. *Milwaukee, etc., Ry. Co.*, 107 Wis. 493, 83 N. W. 851; *Ghee* v. *No. Union Gas Co.*, 158 N. Y. 510; *People* v. *Suburban R. R. Co.*, 182 Ill. 433; *State* v. *East Fifth St. Ry. Co.*, 140 Mo. 539, 62 Am. St. Rep. 742; *Hovelman* v. *K. C. R. R. Co.*, 79 Mo. 632-643. The same doctrine is held where *quo warranto* is brought for forfeiture of these privileges held under a city ordinance. *State* v. *Madison St. R. Co.*, 72 Wis. 612, 1 L. R. A. 771. Another group of cases refers to the right of way as a franchise, and emphasizes the fact that it is a property right which cannot be invaded. It may be sold and assigned, and may survive the life of the corporation itself. *New Orleans, etc. R. R. Co.* v. *Delaware*, 114 U. S. 501; *People* v. *O'Brien*, 111 N. Y. 1, 7 Am. St. Rep. 684, 2 L. R. A. 255; *Detroit Citizens Ry. Co.* v. *City of Detroit*, 64 Fed. 628, 12 C. C. A. 365; *Citizens St. R. Co.* v. *Common Council*, 125 Mich. 673, 84 Am. St. Rep. 589; *Clarksburg E. L. Co.* v. *City of Clarksburg*, 47 W. Va. 739, 50 L. R. A. 142; *Telephone Co.* v. *City of St. Joseph*, 121 Mich. 502; *Township* v. *Rapid Ry. Co.*, 122 Mich. 472, 81 N. W. 337. On the other hand, many courts have held that the right of way in a street is no more a franchise than the grant of a right of way by a private citizen; that it is but a contract right, an easement or grant of authority to use the streets; that a city cannot grant franchises, for they emanate from the state. *East Ala. Ry. Co.* v. *Doe*, 114 U. S. 340, 5 Sup. Ct. 869, 29 L. Ed. 136; *Maybury* v. *Mutual Gas Light Co.*, 38 Mich. 154; *People* v. *Ft. Wayne & E. R. Co.*, 92 Mich. 522, 52 N. W. 1010, 16 L. R. A. 752; *Lincoln St. Ry. Co.* v. *City of Lincoln*, 61 Neb. 109, 84 N. W. 802; *Chicago City Ry. Co.* v. *People*, 73 Ill. 541; *Belington & N. R. Co.* v. *Town of Alston*, 54 W. Va. 597, 46 S. E. 612; *Denver S. F. R. Co.* v. *Domke*, 11 Colo. 247, 17 Pac. 777. The authorities hold that while the right is a mere license when acted upon it is a contract right which must be respected. *Belleville* v. *Citizens, Etc., R. Co.*, 152 Ill. 171, 26 L. R. A. 681; *Metropolitan City Ry. Co.* v.

Chi. W. D. Ry. Co., 87 Ill. 317; *Lake Roland, etc. R. Co.* v. *Baltimore*, 77 Md. 352, 20 L. R. A. 126; See WILGUS' CORP. CASES, Vol. 1, p. 706. For discussion of term "franchise" in this regard, see *Morgan* v. *State of Louisiana*, 93 U. S. 223, 23 L. Ed. 860. In the principal case the term "franchise" as used in the constitutional amendment seems to be a right in the street for a permanent time under contract, while the license issuable by the council is one revocable at any time. When used in that way, the case seems clearly correctly decided.

DAMAGES—LIQUIDATED DAMAGES—DISCOUNTS.—Plaintiff leased certain machines to a shoe company at a specified rental to be paid at the ends of the months succeeding those in which they were earned. Plaintiff agreed that, if the lessee should pay on or before the fifteenth of the succeeding month, a discount of fifty per cent would be granted. The lessee became bankrupt with three months' rental unpaid. Plaintiff claims the full amount is due from the lessee's estate. *Held* (ADAMS, Cir. J., dissenting), the agreed rentals were the actual debt and the fifty per cent was only a discount. Therefore, plaintiff's claim was valid. *United Shoe Machinery Co.* v. *Abbott* (1908), — C. C. A., 8th Cir. —, 158 Fed. Rep. 762.

Circuit Judge ADAMS dissented from this decision on the ground that the lessor had previously accepted fifty per cent of the agreed rental without objection even when it was not paid in time to entitle the lessee to the discount; therefore the first fifty per cent should be considered as the actual debt due and the additional fifty per cent as a penalty which should not be enforced. It is generally held, that, where a large sum is to be paid upon the non-payment of a smaller sum, the larger sum is a penalty if in excess of legal interest. *Clark, Austin & Smith* v. *Kay*, 26 Ga. 403. The question to be decided in such cases is, whether the larger or the smaller sum is the debt actually due. If the former, the provision is enforceable as a discount; if the latter, it is a penalty and therefore unenforceable. Much conflict naturally is found among the authorities in construing such contracts. The principal case is supported by *Mo. Edison Elec. Co.* v. *Steinberg Hat & Fur Co.*, 94 Mo. App. 543, 68 S. W. 383, but is probably in conflict with *Goodyear Co.* v. *Selz, Schwab & Co.*, 157 Ill. 186, 41 N. E. 625. For further discussion, see *Carter* v. *Corley, use, etc.*, 23 Ala. 612; *Longworth* v. *Askren*, 15 O. St. 370; *Cairns* v. *Knight*, 17 O. St. 69; *Berrinkott* v. *Traphagen*, 39 Wis. 219.

DEATH BY WRONGFUL ACT—STATUTE—CONSTRUCTION—DEATH OUTSIDE THE STATE—RIGHT TO SUE.—Illinois Laws 1853, p. 97, § 1, provides that on death by wrongful act the person or corporation which would have been liable for the injury, if death had not ensued, shall be liable notwithstanding the death of the person injured. By-Laws 1903, p. 217, a proviso was added to section 2 of the former act, declaring that no action should be brought or prosecuted in Illinois to recover damages for death occurring outside the state. Action was brought for a wrongful injury to plaintiff's intestate,